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Uthayakumar a/l Ponnusamy v Abdul Wahab bin Abdul Kassim (Pengarah Penjara Kajang) & Ors

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-09–288–07 OF 2016
MOHTARUDDIN BAKI, ABDUL RAHMAN SEBLI AND ZALEHA YUSOF JJCA
26 NOVEMBER 2018

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Civil Procedure — Preliminary objection — Mode of application — Appellant applied for leave to commit respondent for contempt of court — Appellant filed notice of motion for orders to compel respondent to produce certain books and documents; and to compel respondent to allow his entry into prison and to record statement from prison inmates — Respondent filed preliminary objection — Whether appellant used wrong mode and named wrong parties — Whether reliefs prayed for not within jurisdiction of criminal court — Whether appeal incompetent — Whether appeal nugatory and illusory — Whether respondent estopped from raising preliminary objection as it was not raised in court below — Whether s 422 of the Criminal Procedure Code applicable — Courts of Judicature Act 1964 s 56 — Government Proceedings Act 1956 ss 5 & 6 — Rules of Court 2012 O 53 — Rules of the Court of Appeal 1994 r 12

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The appellant was convicted of an offence under s 4 of the Sedition Act 1948 and was sentenced to 30 months imprisonment. On appeal, the sentence was reduced to 24 months. After his release from the Kajang prison, the appellant filed an application for leave to commit the respondent, one Insp Sajideh bin Samin and one Insp Mckenzie for contempt of court. Leave for committal was only granted against the respondent and not Insp Sajideh and Insp Mckenzie. The appellant's appeal was dismissed by the Court of Appeal and subsequently by the Federal Court. As such, presently, only respondent was left to face committal proceedings instituted by the appellant. The alleged contempt of court arose from the following orders made by Mohd Azman Husin J: (a) that the appellant be kept separately from the other inmates and be placed in the place for political prisoners only; and (b) that the appellant be referred to Prof Dr Shanmugarajah of Hospital Universiti Kebangsaan Malaysia to treat his medical condition. For the purposes of the committal proceedings, the appellant vide a notice of motion dated 16 March 2015 applied for, inter alia, orders to compel the respondent to produce certain books and documents; and to compel the respondent to allow his entry into the prison to make video recordings and to record statement from the prison inmates ('the appellant's application'). The application was dismissed by the High Court, hence, the present appeal. In the present appeal, the respondent raised a preliminary

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objection to the appellant's appeal based on the following grounds: (i) the appellant had used the wrong mode and had named the wrong parties and thus the reliefs prayed for were not within the jurisdiction of the criminal court; (ii) the appeal was incompetent as it fell outside the ambit and failed to fulfill the requirements of s 50(2) of the Courts of Judicature Act 1964 ('the CJA'); and (iii) the appeal was nugatory and illusory in the light of the present court's decision in the case of *Uthayakumar a/l Ponnusamy v Abdul Wahab bin Abdul Kassim (Pengarah Penjara Kajang) & Ors* [2016] 6 MLJ 670 ('the previous appeal'). On the other hand, the appellant contended that the respondent was estopped from raising the preliminary objection on the ground that it was not raised in the court below. The appellant also relied on s 422 of the Criminal Procedure Code ('the CPC') and submitted that the irregularities did not vitiate the proceedings as no failure of justice had been occasioned.

Held, striking out the appellant's appeal:

(1) There could be no argument that the appellant's application was for all intents and purposes an application for an order of mandamus against the respondent. Such being the nature of his application, it should have been by way of judicial review under O 53 of the Rules of Court 2012 in the civil court instead of by way of notice of motion in the criminal court as was done by the appellant (see paras 14–15).

(2) The respondent, being a public officer, was an officer of the government and as such he acted for and on behalf of the government, unless he acted outside the scope of his employment. If the respondent committed any wrongful act or neglect in the course of his employment, it was the government that would assume liability for his acts or omissions by operation of the common law doctrine of vicarious liability, which was embedded in ss 5 and 6 of the Government Proceedings Act 1956. As such, in the present case, the appellant ought to have named the Government of Malaysia as a party to the application (see paras 22–23).

(3) Since the wrong mode was adopted, the proceedings in the court below was a nullity for want of jurisdiction. Any order that flowed from such null and void proceedings was likewise null and void and may be collaterally attacked on appeal even where no objection was raised in the court below on the jurisdiction of the court. The failure to adopt the correct mode was a fatal defect and could not be cured by s 56 of the CJA, nor by r 12 of the Rules of the Court of Appeal 1994 (see para 25).

(4) The decision of the court in the previous appeal had a direct bearing on the present appeal in that the respondent could not be in contempt of court against 'a mere administrative direction' in respect of which both Insp Sajideh and Insp Mckenzie had been held not guilty of. The appellant's committal proceedings had clearly become unsustainable, and

the appellant could not possibly hope to achieve any practical result by obtaining the orders sought. It would be an exercise in futility (see paras 28–29).

(5) Section 422 of the CPC was wholly irrelevant in the present case as it only applied to criminal proceedings under the CPC and not to civil proceedings (see paras 30–31).

[Bahasa Malaysia summary

Perayu telah disabitkan kesalahan di bawah s 4 Akta Hasutan 1948 dan dihukum penjara 30 bulan. Atas rayuan, hukuman telah dikurangkan kepada 24 bulan. Selepas pembebasannya dari penjara ajang, perayu telah memfailkan pemohonan untuk kebenaran mendakwa responden, Insp Sajideh bin Samin dan Insp Mckenzie kerana menghina mahkamah. Kebenaran untuk komital itu hanya diberikan terhadap responden dan bukan Insp Sajideh dan Insp Mckenzie. Rayuan perayu telah ditolak oleh Mahkamah Rayuan dan berikutan itu oleh Mahkamah Persekutuan. Oleh itu, kini, hanya responden sahaja berhadapan dengan prosiding komital yang dimulakan oleh perayu. Penghinaan mahkamah yang dikatakan itu timbul daripada perintah-perintah berikutnya yang dibuat oleh Mohd Azman Husin H: (a) bahawa perayu disimpan berasingan daripada banduan lain dan diletakkan dalam tempat untuk tahanan politik sahaja; dan (b) bahawa perayu dirujuk kepada Prof Dr Shanmugarajah dari Hospital Universiti Kebangsaan Malaysia untuk merawat keadaan perubatannya. Bagi tujua prosiding komital, perayu melalui notis usul bertarikh 16 Mac 2015 memohon untuk, antara lain, perintah-perintah untuk memaksa responden untuk mengemukakan buku dan dokumen tertentu; dan untuk memaksa responden membenarkan kemasukannya dalam penjara untuk membuat rakaman video dan untuk merakamkan kenyataan daripada banduan penjara ('permohonan perayu'). Permohonan itu telah ditolak oleh Mahkamah Tinggi, justeru rayuan ini. Dalam rayuan ini, responden telah menimbulkan bantahan awal terhadap rayuan perayu berdasarkan alasan-alasan berikut: (i) perayu telah menggunakan cara yang salah dan telah menamakan pihak-pihak yang salah dan oleh itu relif-relif yang dipohon bukan dalam bidang kuasa mahkamah jenayah; (ii) rayuan itu tidak kompeten kerana tidak terjatuh dalam skop dan gagal menemui keperluan s 50(2) Akta Mahkamah Kehakiman 1964 ('AMK'); dan (iii) rayuan itu tidak penting dan hanya ilusi berdasarkan keputusan mahkamah ini dalam kes *Uthayakumar a/l Ponnusamy v Abdul Wahab bin Abdul Kassim (Pengarah Penjara Kajang) & Ors* [2016] 6 MLJ 670 ('rayuan sebelum ini'). Sebaliknya, perayu menegaskan bahawa responden diestopkan daripada menimbulkan bantahan awal atas alasan bahawa ia tidak ditimbulkan di mahkamah bawahan. Perayu juga telah bergantung keppada s 422 Kanun Tatacara Jenayah ('KTJ') dan berhujah bahawa luar aturan tersebut tidak melemahkan prosiding kerana tiada kegagalan keadilan telah berlaku.

Diputuskan, membatalkan rayuan perayu:

(1) Tidak ada hujah bahawa permohonan perayu adalah untuk semua niat dan tujuan suatu permohonan bagi perintah mandamus terhadap responden. Jika itu sifat permohonannya, ia patut melalui semakan kehakiman di bawah A 53 Kaedah-Kaedah Mahkamah 2012 di mahkamah sivil dan bukan melalui notis usul di mahkamah jenayah sebagaimana dilakukan oleh perayu (lihat perenggan 14–15).

(2) Responden, sebagai seorang penjawat awam, adalah pegawai kerajaan dan oleh itu dia bertindak untuk dan bagi pihak kerajaan, kecuali dia telah bertindak di luar skop pekerjaannya. Jika responden telah melakukan apa-apa perbuatan yang salah atau cuai sepanjang pekerjaannya, ia adalah kerajaan yang akan bertanggungjawab untuk perbuatan dan peninggalannya melalui operasi doktrin liabiliti vikarius undang-undang am, yang termaktub dalam ss 5 dan 6 Akta Prosiding Kerajaan 1956. Oleh itu, dalam kes ini, perayu patut menamakan Kerajaan Malaysia sebagai satu pihak kepada permohonan tersebut (lihat perenggan 22–23).

(3) Oleh kerana cara yang salah telah diguna pakai, prosiding di mahkamah bawahan terbatal kerana tiada bidang kuasa. Apa-apa perintah yang wujud daripada prosiding yang terbatal dan tidak sah adalah dengan itu terbatal dan tidak sah dan boleh secara kolateral diserang semasa rayuan di mana tiada bantahan ditimbulkan di mahkamah bawahan berhubung bidang kuasa mahkamah. Kegagalan untuk menggunapakai cara yang betul adalah satu kecacatan yang memudaratkan dan tidak boleh dipulihkan oleh s 56 AMK, mahu pun oleh k 12 Kaedah-Kaedah Mahkamah Rayuan 1994 (lihat perenggan 25).

(4) Keputusan mahkamah dalam rayuan sebelumnya mempunyai kesan langsung ke atas rayuan ini di mana responden tidak mungkin menghina mahkamah terhadap 'a mere administrative direction' yang mana ia berkaitan kedua-dua Insp Sajideh dan Insp Mckenzie yan diputuskan tidak bersalah. Prosiding komital perayu jelas tidak dapat dikekalkan, dan perayu tidak mungkin dapat mengharapkan untuk mencapai apa-apa hasil yang praktikal dengan memperoleh perintah-perintah yang dipohon. Ia merupakan satu usaha yang gagal (lihat perenggan 28–29).

(5) Seksyen 422 KTJ langsung tidak relevan dalam kes ini kerana ia hanya terpakai kepada prosiding jenayah di bawah KTJ dan bukan prosiding sivil (lihat perenggan 30–31).]

Notes

For a case on mode of application, see 2(4) *Mallal's Digest* (5th Ed, 2017 Reissue) para 8118.

Cases referred to

Koon Hoi Chow v Pretam Singh [1972] 1 MLJ 180b (refd)
Uthayakumar a/l Ponnusamy v Abdul Wahab bin Abdul Kassim (Pengarah Penjara Kajang) & Ors [2016] 6 MLJ 670, CA (refd)

Legislation referred to

Criminal Procedure Code s 422
Courts of Judicature Act 1964 ss 50(2), 56, Schedule, para 1
Government Proceedings Act 1956 ss 5, 6
Rules of Court 2012 O 53, O 53 rr 1(1), 1(2), 3(1), (6)
Rules of the Court of Appeal 1994 rr 12, 58, 58(2), Form 5
Rules of the High Court 1980 O 42, O 45
Sedition Act 1948 s 4
Specific Relief Act 1950 s 44(1), Chapter VIII

Appeal from: Criminal Application No 44–26–03 of 2015 (High Court, Kuala Lumpur)

Manogaran (P Uthayakumar with him) (Manogar & Co) for the appellant.
Nadia Hanim bt Mohd Tajuddin (Muhammad Azmi bin Mashud with her) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Abdul Rahman Sebli JCA (delivering judgment of the court):

[1] Having heard arguments by both sides, we struck out the appellant's appeal on a preliminary objection raised by the respondent. Before we deal with the reasons why we upheld the preliminary objection, it is necessary to set out the factual background leading to the present appeal.

[2] The appellant was convicted by the Kuala Lumpur Sessions Court on 5 June 2013 of an offence under s 4 of the Sedition Act 1948 and was sentenced to 30 months imprisonment. He filed an appeal to the High Court but did not apply for bail pending appeal and thus he started serving his sentence immediately from 5 June 2013.

[3] As it turned out, his imprisonment sentence of 30 months imposed by the sessions court was reduced to 24 months on appeal and he was released from the Kajang prison on 2 October 2014.

[4] The appellant alleged that during his incarceration at the Kajang prison pending disposal of his appeal, the respondent committed contempt of court. The alleged contempt of court arose from the following orders made by Mohd Azman Husin J on 9 December 2013:

(a) that the appellant be kept separately from the other inmates and be placed in the place for political prisoners only; and

(b) that the appellant be referred to Professor Dr Shanmugarajah of Hospital Universiti Kebangsaan Malaysia to treat his medical condition.

[5] Pursuant to the orders, the Deputy Registrar of the High Court, criminal division, wrote to the officer in charge of the Kajang prison vide letter dated 12 December 2013 notifying him of the orders issued by the court. We reproduce below paras 2, 3, 4 and 5 of the letter:

> 2. Adalah dimaklumkan bahawa kes ini telah ditetapkan untuk Bicara pada 15.1.2014 di hadapan YA Hakim Dato' Mohd Azman bin Husin.
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> 3. Pada tarikh yang lepas, berdasarkan permohonan dari Peguambela Perayu, YA Hakim telah mengarahkan supaya perayu dirujuk ke Hospital Universiti Kebangsaan Malaysia untuk mendapatkan rawatan lanjut bagi penyakit yang dihadapinya.
>
> 4. Selanjutnya YA Hakim juga mengarahkan supaya Perayu ini diasingkan dari banduan-banduan lain dan hanya ditempatkan dengan banduan politik sahaja.
>
> 5. Kerjasama dan perhatian pihak tuan berhubung perkara tersebut di atas amatlah dihargai.

[6] The appellant alleged that the respondent refused to comply with the orders. What he did after his release from the Kajang prison was to file in the High Court at Kuala Lumpur an application for leave to commit the respondent to prison for contempt of court. The application also named two other prison officers, namely Insp Sajideh bin Samin and Insp McKenzie.

[7] The application was heard and disposed of on 14 November 2014, whereby leave for committal was only granted against the respondent but not against Insp Sajideh bin Samin and Insp Mckenzie.

[8] The appellant appealed against the refusal by the High Court to grant leave for committal against Insp Sajideh bin Samin and Insp Mckenzie but was dismissed by this court and the Federal Court. Thus, presently only the respondent was left to face the committal proceedings instituted by the appellant.

[9] For the purposes of the committal proceedings against the respondent, the appellant vide notice of motion dated 16 March 2015 applied, inter alia, for the following orders:

(a) that the respondent (the Director of Kajang Prison) allows the appellant to enter the Kajang Prison accompanied by his counsel and representatives of SUHAKAM for the purpose of recording videos

and/or photographs as well as recording of statements from the prison inmates and in doing so, that the appellant's security is guaranteed by the respondent;

(b) that the respondent produces and hands over to the appellant within seven days copies of 'Request Rasmi Penjara Kajang' which allegedly contain 17 or more complaints lodged by the appellant;

(c) that the respondent produces and hands over to the appellant within seven days three books belonging to the appellant which was previously confiscated in the Kajang Prison;

(d) that the respondent produces and hands over to the appellant within seven days copies of 'Surat Arahan Penjara' containing guidelines stipulating that only three days is provided for an inmate in quarantine at the Quarantine Block (Tawakkal);

(e) that the respondent produces and hands over to the appellant within seven days all colour photographs and/or photographs taken of the prison at Block K 'Bilik Gelap' (Blok Insaf) and also the Quarantine Block (Tawakkal); and

(f) the attendance of several individuals as the appellant's witnesses for the contempt proceedings.

[10] The application was dismissed by the learned High Court judge. It was against this decision that the present appeal was lodged by the appellant. At the outset of the hearing, the learned DPP acting for the respondent raised a preliminary objection to the appellant's appeal, on the following grounds:

(a) the appellant had used the wrong mode and had named the wrong parties and thus the reliefs prayed for were not within the jurisdiction of the criminal court;

(b) the appeal was incompetent as it fell outside the ambit and failed to fulfil the requirements of s 50(2) of the Courts of Judicature Act 1964 ('the CJA'); and

(c) the appeal was nugatory and illusory in the light of this court's decision in the case of *Uthayakumar a/l Ponnusamy v Abdul Wahab bin Abdul Kassim (Pengarah Penjara Kajang) & Ors* [2016] 6 MLJ 670.

[11] The appellant's response to the objection was that his appeal was in order and in compliance with r 58 of the Rules of the Court of Appeal 1994 ('the RCA'). It was argued that sub-r 2 of r 58 in Form 5 of the RCA provides a sample of the form to be used but the sub-rule does not make it a mandatory requirement. According to the appellant, what was important was that the

notice of appeal substantially laid down the material points and facts before the court for adjudication.

[12] It was further submitted that the learned DPP was estopped from raising the objection as it was never raised in the court below. In the alternative, it was argued that even if the mode that he adopted was not in accordance with the Rules, this court could invoke r 12 of the RCA which provides that non-compliance with the rules shall not render any proceedings void.

[13] We were also referred to s 56 of the CJA which provides as follows:

> 56 The Court of Appeal may in its discretion, on the application of any person desirous of appealing who may be debarred from so doing by reason of his not having observed some formality or some requirement of this Act, permit an appeal upon such terms and with such directions as it may consider desirable in order that substantial justice may be done in the matter, and may, for the purpose, enlarge any period of time prescribed by section 51 or 53.

[14] Having heard arguments by both sides, we upheld the preliminary objection. These are our grounds. First of all, there can be no argument that the appellant's application to compel the respondent to produce certain books and documents and to compel the respondent to allow him entry into the prison to make video recordings and to record statements from the prison inmates was for all intents and purposes an application for an order of mandamus against the respondent.

[15] Such being the nature of his application, it should have been made by way of judicial review in the civil court instead of by way of a notice of motion in the criminal court as was done by the appellant. Order 53 r 1(1) of the Rules of Court 2012 ('the Rules') is relevant and provides as follows:

> 1(1) This Order shall govern all applications seeking relief specified in paragraph 1 of the Schedule to the Courts of Judicature Act 1964 and for the purposes specified therein.

[16] The reliefs that the appellant prayed for clearly fall under para 1 of the Schedule to the CJA under the heading 'Prerogative writs', which reads:

> 1 Power to issue to any person or authority directions, orders or writs, including writs of the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose.

[17] In an application for judicial review, one of the requirements that the applicant must comply with is that the prior leave of the court must have been granted before the application could be made (O 53 r 3(1)). Obviously this was

not done by the appellant, due to the mode that he adopted to commence his action.

[18] The other important requirement that the appellant had to fulfil but which he did not fulfil was for him to file the application promptly and in any event within three months from the date when the grounds of application first arose or when the decision was first communicated to him (O 53 r 3(6)). The appellant cannot be allowed to circumvent this mandatory requirement by making an application by way of a notice of motion.

[19] Order 53 r 1(2) of the Rules further provides that the application for judicial review is subject to the provisions of Chapter VIII of the Specific Relief Act 1950 ('the SRA'). Chapter VIII of the SRA relates to the enforcement of public duties, in relation to which s 44(1) provides as follows:

> 44(1) A Judge may make an order requiring any specific act to be done or forborne, by any person holding a public office, whether of a permanent or a temporary nature, or by any corporation or any court subordinate to the High Court:
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> Provided that —
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> (a) an application for such an order be made by some person whose property, franchise, or personal right would be injured by the forbearing or doing, as the case may be, of the said specific act;
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> (b) such doing or forbearing is, under any law for the time being in force, clearly incumbent on the person or court in his or its public character, or on the corporation in its corporate character;
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> (c) in the opinion of the Judge the doing or forbearing is consonant to right and justice;
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> (d) the application has no other specific and adequate legal remedy; and
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> (e) the remedy given by the order applied for will be complete.

[20] The five conditions laid down by the above proviso are cumulative and all of them must be fulfilled: see *Koon Hoi Chow v Pretam Singh* [1972] 1 MLJ 180b where Sharma J held at p 181:

> Five conditions are laid down in s 44 and these conditions are the five provisos contained in the section which the applicant must satisfy. They are cumulative and all of them must be fulfilled.

[21] Since the appellant's application was not, in the first place, commenced by the correct mode, ie by way of judicial review under O 53 of the Rules, the question of the appellant having fulfilled all these five conditions does not arise.

[22] The learned DPP had also raised the point that the appellant ought to

A have named the Government of Malaysia as a party to the application by virtue of s 5 of the Government Proceedings Act 1956 ('the GPA'), which is couched in the following language:

> 5 Subject to this Act, the Government shall be liable for any wrongful act done or any neglect or default committed by any public officer in the same manner and to the same extent as that in which a principal, being a private person, is liable for any wrongful act done, or any neglect or default committed by his agent, and for the purposes of this section and without prejudice to the generality thereof, any public officer acting or purporting in good faith to be acting in pursuance of a duty imposed by law shall be deemed to be an agent of and to be acting under the instructions of the Government.

[23] We agreed. The respondent, being a public officer, is an officer of the government and as such he acts for and on behalf of the government, unless he acts outside the scope of his employment. Therefore, if he commits any wrongful act or neglect in the course of his employment, it is the government that will assume liability for his acts or omissions by operation of the common law doctrine of vicarious liability, which is embedded in ss 5 and 6 of the GPA.

[24] As for the appellant's contention that the respondent was estopped from raising the preliminary objection on the ground that it was not raised in the court below, we found no merit in the argument. The preliminary objection was based on a jurisdictional point, ie that the High Court had no jurisdiction to hear an application for an order of mandamus which under the law should have been commenced by way of judicial review under O 53 of the Rules and not by way of a notice of motion.

[25] Since the wrong mode was adopted, the proceedings in the court below was a nullity for want of jurisdiction. Any order that flowed from such null and void proceedings is likewise null and void and may be collaterally attacked on appeal even where no objection was raised in the court below on the jurisdiction of the court. In our view the failure to adopt the correct mode is a fatal defect and cannot be cured by s 56 of the CJA, nor by r 12 of the RCA.

[26] With regard to the nugatory point raised by the respondent, the learned DPP drew our attention to the decision of this court in the appellant's appeal against the refusal by the High Court to grant leave to institute committal proceedings against Insp Sajideh bin Samin and Insp Mckenzie (Appeal No W-09–377–12 of 2014) where it was decided, inter alia, as follows:

(a) 'The nature of the 'order' that was given was neither final nor interlocutory. It appears to us that the 'order' made by the court was made out of compassion and consideration of personal wellbeing of the appellant and his family';

(b) '… we are inclined to regard the purported 'order' made by the court as a mere administrative directions to the respondents to be carried out by the respondents in accordance with rules administered by the respondents at the respondents' discretion and convenient';

(c) 'It is our view that administrative directives issued by the court do not come within the meaning of 'order' or 'judgment' under O 42 of the RHC 1980 (or the relevant rule in the ROC 2012) that is capable of enforcement under O 45. It is of great importance that the court that hears application for leave to commence committal to draw the distinction between a 'judgment' or 'order' within the meaning of O 42 and an administrative direction made by the court. A breach, or non-compliance of an order that falls within the ambit of O 42 will attract contempt proceedings. But non-compliance with an administrative directive may or may not have the same effect'; and

(d) 'Clearly there has been non-compliance with the rules. On this ground alone the leave ought to have been refused'.

[27] We were mindful of the fact that unlike the appeal in that case, the appeal before us was not against the refusal by the High Court to grant leave for committal, but in our view the relevance of the case lies in the fact that the present appeal emanated from the same orders made by Mohd Azman Husin J on 9 December 2013. In fact, it was based on these orders that the committal proceedings against the respondent was launched by the appellant, and the orders that he sought in the present appeal were intended to be used in the committal proceedings.

[28] Since the Federal Court had affirmed this court's decision that there could be no contempt of court by Insp Sajideh bin Samin and Insp Mckenzie for failing to comply with the court orders, we do not see how the respondent could be held to be in contempt of court for committing exactly the same act. The appellant's committal proceedings has clearly become unsustainable, and the appellant could not possibly hope to achieve any practical result by obtaining the orders sought. It will be an exercise in futility.

[29] Although we were only dealing with a preliminary objection raised by the respondent, the decision of this court in that appeal has a direct bearing on the present appeal in that the respondent could not be in contempt of court against 'a mere administrative direction' in respect of which both Insp Sajideh bin Samin and Insp Mckenzie had been held to be not guilty of. The end result is that even if the prayers sought by the appellant were to be granted, the committal proceedings no longer has any leg to stand on.

[30] It was also the appellant's contention that the irregularities does not

vitiate the proceedings as no failure of justice had been occasioned, citing s 422 of the Criminal Procedure Code ('the CPC') which provides as follows:

> 422 Subject to the provisions contained in this Chapter no finding, sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account of —
>
> (a) any error, omission or irregularity in the complaint, sanction, consent, summons, warrant, charge, judgment or other proceedings before or during trial, or in any inquiry or or other proceedings under this Code;
>
> (b) the want of any sanction; or
>
> (c) the improper admission or rejection of any evidence,
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> unless such error, omission, irregularity, want, or improper admission or rejection of evidence has occasioned a failure of justice.

[31] With due respect to learned counsel, the provision is wholly irrelevant as it only applies to criminal proceedings under the CPC and not to civil proceedings under the Rules.

[32] It was for all the reasons aforesaid that we found the appellant's appeal to be incompetent and accordingly struck it out.

Appellant's appeal struck out.

Reported by Dzulqarnain Ab Fatar